

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF VETERANS AFFAIRS

<p>Monty R. Sinner,</p> <p style="text-align: center;">Petitioner,</p> <p>vs.</p> <p>East Central School District (ISD) #2580,</p> <p style="text-align: center;">Respondent.</p>	<p>ORDER ON MOTION TO QUASH SUBPOENA</p>
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On August 16, 2006, the Office of Administrative Hearings issued a subpoena to arbitrator Nancy D. Powers at the request of the Respondent, East Central School District #2580 (the School District). On September 1, 2006, Ms. Powers moved to quash the subpoena. On September 5, 2006, the School District filed a written response to the motion to quash. Ms. Powers' motion is now before the undersigned Administrative Law Judge.

Margaret A. Skelton, Ratwik, Roszak & Maloney, P.A., 300 U.S. Trust Building, 730 Second Ave South, Minneapolis, MN 55402, represents the Respondent, (Respondent). Tammy P. Friederichs, Friederichs & Thompson, P.A., 1120 East 80th Street Suite 106, Bloomington, MN 55420, represents Monty R. Sinner (Petitioner). Nancy D. Powers, Arbitrator, 3010 Hennepin Ave South, Suite 632, Minneapolis, MN 55408, appears *pro se* in order to move to quash her subpoena.

Based upon all the files, records, and proceedings herein, and for the reasons set forth in the accompany Memorandum, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED, that the motion of Nancy D. Power to quash her subpoena is GRANTED.

Dated: September 7, 2006

s/Bruce H. Johnson

BRUCE H. JOHNSON

Assistant Chief Administrative Law Judge

MEMORANDUM

Ms. Powers has moved to quash her subpoena on the grounds that arbitrators are generally immune from subpoenas to testify about matters concerning decisions they have issued. In its response to her motion,¹ the School District argues that it is not seeking to elicit Ms. Powers' testimony in her capacity as an arbitrator but rather as a witness to alleged *ex parte* statements made by Mr. Sinner prior to the hearing before Ms. Powers. The School District also indicates that it is seeking to elicit Ms. Powers' testimony regarding the parties' agreement to combine the grievance hearing and the Veterans' Preference hearings.²

Ms. Powers presided at an arbitration hearing on January 3, 2006, that followed Mr. Sinner's discharge from employment as a school bus driver for the School District. A major issue in this case is whether or not that hearing was a combined grievance and Veterans' Preference hearing. Mr. Sinner asserts that he did not agree to a combined grievance and Veterans' Preference hearing. The School District argues that Mr. Sinner did agree to a combined hearing. It seeks the testimony from the arbitrator to support that argument.

Ms. Powers argues that an arbitrator cannot be subpoenaed, citing cases which prohibit inquiry into the decision of an arbitrator. Having requested the subpoena, the School District argues that it is not seeking to inquire into the merits of Ms. Powers' decision, but rather that it is seeking Ms. Powers' testimony for two purposes that the School District argues are collateral to the merits of her arbitration award—first, testimony regarding *ex parte* statements allegedly made to her by Mr. Sinner prior to the hearing; and second, testimony regarding the parties' alleged agreement to combine the grievance hearing and the Veterans' Preference hearing. Both Ms. Powers and Respondent cite a number of cases in support of their respective positions.

The general rule is that the arbitrator's award is the best evidence of the matters purportedly determined by the arbitrator and that parole evidence from the arbitrator is not admissible to prove the implications or meaning of the arbitrator's award.³ However, relying upon *Grudem Brothers Co. v. Great Western Piping Corp.*⁴ and two unpublished decision from the Minnesota Court of Appeals, the School District argues that an arbitrator is competent to testify concerning the matters that were submitted for decision and consideration. While the cases cited in *Grudem* recognize the possibility that an arbitrator can be compelled to testify in certain situations, in several of the cases that the School District relies on, the reviewing courts ultimately declined to permit the

¹ School District's Memorandum in Opposition to Motion to Quash Subpoena filed on September 5, 2006 (School District's Memorandum) at p. 1.

² *Id.*

³ *Grudem Bros. Co. v. Great Western Piping Corp.*, 213 N.W. 2d 920, 924 (Minn. 1973).

⁴ *Id.*

arbitrator's testimony. In *Fukaya Trading Co. v Eastern Marine Corp.*,⁵ a party sought to inquire into the "motives" of the arbitrators to determine if they acted with prejudice. The *Fukaya* court declined to permit the arbitrators' testimony because the award showed the "matters considered by the arbitrators," and there was nothing "to indicate that the arbitrators made a 'mistake that caused the award to operate in a way that they did not intend'."⁶ In *Gramling v. Food Machinery and Chemical Corp.*,⁷ the disappointed arbitrating party attempted to require the members of an arbitration panel to testify regarding "the method of arriving at their award."⁸ The court did not permit the testimony. Respondent also cites *Local P-9, United Food and Commercial Workers Int'l Union v. Hormel & Co.*⁹ In that case, the arbitrator had informed the parties at the initial hearing that the first award would only be preliminary and open for reconsideration, but there was no suggestion that the arbitrator's award in this case was a draft or preliminary award.¹⁰

The issues raised by this motion focus on the scope of the arbitrator's decision. The School District seeks to elicit the arbitrator's testimony regarding Mr. Sinner's "alleged ex parte statements." The arbitrator's testimony is not elicited to show what the arbitrator considered to have been "submitted for decision." Rather, the School District is proposing to introduce the arbitrator's testimony to show what Mr. Sinner did or did not say about the issues that were being submitted for arbitration. Moreover, this is not a case where the arbitration award was silent about the issues being arbitrated. Ms. Powers' arbitration award expressly addresses the question of whether or not that proceeding was a combined grievance and Veterans Preference hearing.¹¹ The problem, if any, is that the text of the award does not appear to be unequivocal on that point, and the parties have differing interpretations of what the text of the award means. In effect, the School District is seeking to have Ms. Powers testify because it expects that her testimony will resolve any ambiguity within the text of the award in the School District's favor. Although the School District couches its argument in terms of seeking testimony on collateral *ex parte* conversations with Mr. Sinner, the relevance of that testimony is to explain or interpret the language in the award that addresses whether or not the January 3, 2006 hearing was a combined hearing. The School District cites no authority for the proposition that an arbitrator can be compelled to testify about pre-hearing *ex parte* conversations with a party that might bear on interpretation of the language in the award. As the Minnesota Supreme Court concluded in *Grudem Brothers Co. v. Great Western Piping Corp.*, *supra*, "[t]he award should be interpreted from the language used therein rather than the testimony of one of the arbitrators as to

⁵ 322 F. Supp. 278 (E.D.La. 1971).

⁶ *Id.* at 280.

⁷ 151 F. Supp. 853 (W.D.S.C. 1957).

⁸ *Id.* at 860.

⁹ 776 F.2d 1393 (8th Cir. 1985).

¹⁰ *Id.* at 1395

¹¹ See Ex. T. to Respondent District's Motion for Summary Disposition.

what they meant to do by the award.”¹² For these reasons, Ms. Powers’ motion to quash her subpoena is granted.

B.H.J.

¹² *Grudem Bros. Co. v. Great Western Piping Corp.*, 213 N.W. 2d 920, 924 (Minn. 1973).